Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

DAN WILLBANKS,
PETITIONER

V.

JIM E. CROTTS
JOHN KECK
ALAMO RANCH CO.
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO DIV. 2 OF THE ARIZONA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Dan Willbanks
5158 W. Buford Ln.
McNeal, AZ 85617
(520) 642-3746

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606 pgs

QUESTIONS PRESENTED FOR REVIEW

1. Does the Arizona Farm Protection Act (A.R.S. Sec. 3-112) conflict with the provisions of the 5th and 14th Amendments to the U. S. Constitution when used in Tort Actions for Damages based on private nuisance between strictly private parties?

2. Was this petitioner effectively denied a jury trial to determine liability and damages for annoyance, inconvenience, and discomfort of his home, in violation of the 7th and 14th Amendments to the U.S. Constitution?

3. Have the respondents been given a "noise easement", under color of state law, in violation of the 5th and 14th amendments to the U.S. Constitution?

4. Would the due process clause of the 14th Amendment be violated by:
   (1) Judge Brown's refusal to honor timely filed Notices of Change of Judge, without hearing;
   (2) The imposition of heavy sanctions (payable to the court to be later disposed of by Judge Brown), immediately after the filing of Notice of Change of Judge, without hearing?

5. Would the equal protection clause of the 14th Amendment be violated by the granting of costs and attorney fees since the Arizona courts have constantly held that, in tort actions, costs and fees are not available?

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of Div. 2 of Arizona Court of Appeals is a "memorandum" unreported decision and is reprinted in the appendix hereto ("App.") at page 1a. The order of Div. 2 of the Az. Ct. App. denying reconsideration is reprinted at App. page 13a. The order of the Arizona Supreme Court denying the petition for review is reprinted at App. page 15a. The Superior Court's "Findings of Fact & Conclusions of Law" is reprinted at App. page 17a.

JURISDICTION

The decision of Div. 2 of the Arizona Court of Appeals was entered on September 28, 1995. (App. 1a) The order of Div. 2 of the Az. Ct. of App. denying reconsideration was filed on October 20, 1995, (App. page 13a). The order of the Supreme Court of Arizona denying petition for review was filed on April 25, 1996, (App. page 15a). The findings of fact and conclusion of law by the Superior Court was filed December 8, 1994, (App. page 17a). The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1257. 28 U.S.C. Sec. 2403(b) may apply and the notifications required by Rule 29.4(C) have been made.

U.S. CONSTITUTIONAL PROVISIONS INVOLVED

(1) Amendment 1 (2) Amendment 5
(3) Amendment 7 (4) Amendment 14

ARIZONA CONSTITUTION

(1) Article 2, Sections 3, 4, 5, 9, 13, 17, 23. (2) Article 4, part 2, Section 19, sub-sections 6 & 13. (3) Article 6, Sections 17 & 21.

STATUTES

(1) 28U.S.C. Sec. 1257 (2) A.R.S. Sec. 3-112. (3) A.R.S. Sec. 12-409. (4) A.R.S. Sec. 12-410. (5) A.R.S. Sec. 2917(A).

RULES

Rule 42, Az. R. Civ. P.; and Rule 13 of the Uniform Rules of Practice for the Superior Courts of Arizona.

STATEMENT OF THE CASE

1. Petitioner and wife acquired their property, in joint tenancy, on October 23, 1972.
2. In May 1983, petitioner quit-claimed his interest in the property to his wife, Fay C. Willbanks.
3. Respondents acquired their adjacent property on December 29, 1976.
4. On respondent's property, there is an irrigation well and pump which is powered by an internal combustion engine fueled by natural gas.
5. In either February or March of 1974, a six-cylinder Caterpillar engine was installed, by a previous owner, at the irrigation well.
6. This Caterpillar engine was operated, without mufflers, until May 1992.
7. In May 1992, a V-8 Teco engine was installed on respondent's irrigation well.
8. This Teco engine was operated for 12

days (24 hours a day) without mufflers, during which time petitioner complained, by telephone, to the parties involved in the installation of this engine, about the noise emitted by this Teco engine. Petitioner was informed that mufflers would be installed.

9. After this Teco engine had been operated for 12 days (24 hours a day) without mufflers, two inadequate mufflers were installed on this Teco engine.

10. On June 1, 1992, petitioner mailed a letter of "Notice and Demand" to respondents warning that if the noise was not abated, petitioner would sue.

11. The noise continuing, on July 6, 1992, petitioner filed his first Tort Action (CV 92-07-00375) for damages, alleging nuisance.

12. The noise continuing, on October 2, 1992, petitioner filed an Action in Equity for an injunction (CV 92-10-00510), asking the court to abate this noise.

13. By minute entry (Without hearing) dated October 6, 1992, Judge James L. Riley dismissed petitioner's first Tort Action.

14. In a hearing on November 9, 1992, Judge Riley entered a judgement dismissing CV 92-07-00375, granting summary judgement, and awarding costs and fees of over $4,000.00 against petitioner.

15. On November 30, 1992, petitioner filed a Notice of Appeal.

16. The noise continuing, on March 9, 1993, petitioner filed his second Tort Action for Damages (CV 93-03-00097) alleging nuisance.

17. The noise continuing, on May 5, 1993, petitioner filed his third Tort

Action for Damages (CV 93-05-00206) for nuisance.

18. On June 4, 1993, petitioner filed a "Complaint for an Immediate Injunction" (CV 93-06-00248) asking the court to stop a dog, domiciled on respondent's property from further trespassing and damaging small trees petitioner had planted.

19. The noise continuing, on July 6, 1993, petitioner filed his fourth Tort Action for Damages (CV 93-07-00318) alleging (1) Nuisance, (2) Illegal conversion of private property, (3) Illegally taking and damaging private property for private use without just compensation having first been made.

20. The noise continuing, on August 4, 1993, petitioner filed his fifth Tort Action for Damages (CV 93-08-00443) alleging (1) Nuisance, (2) Illegal conversion of private property, (3) Illegally taking and damaging private property for private use without just compensation having first been made.

21. On August 9, 1993, Judge Riley laid down the "law of the case"; consolidating CV 93-03-00097, CV 93-05-00206, CV 93-06-00248, and CV 93-07-00318 into CV 92-10-00510; ruled that petitioner could not have a "legal" jury trial, but only an equitable advisory jury trial; ordering the Clerk of the Court not to accept for filing anymore of the petitioner's complaints without Judge Riley's permission.

22. On August 17, 1993, Div. 2 of the Ariz. Court of Appeals remanded petitioner's first Tort Action (CV 92-07-00375) back to the Superior Court.

23. On August 23, 1993, petitioner filed a "Special Action" in Div. 2 of the Arizona Court of Appeals,

challenging Judge Riley's rulings of August 9, 1993.

24. Both the Court of Appeals and the Arizona Supreme Court refused jurisdiction of petitioner's special action. Petitioner had based his special action on an unsigned minute entry.

25. On August 24, 1993, petitioner filed a notice of Change of Judge as of right pursuant to Rule 42(f)(1)(a) of the Ariz. Rules of Civil Procedure, against Judge Riley, in case # CV 92-07-00375 only.

26. In September 1993, respondents installed a third muffler on the Teco engine which did substantially reduce the exhaust noise but did nothing to contain the mechanical noise of the engine and pumphead.

27. By minute entry dated September 15, 1993, Judge Riley (after noting that a notice of change of judge had been filed in CV 92-07-00375) attempted to consolidate the previously consolidated cases into CV 92-07-00375 and transferred the cases to the Court Administrators to be assigned to another judge.

28. On October 1, 1993, cases numbered CV 92-07-00375; CV 92-10-00510; CV 93-03-00097; CV 93-05-00206; CV 93-06-00248; and CV 93-07-00318 were reassigned to Judge Michael J. Brown of Pima County.

29. On October 19, 1993 Case # CV 93-08-00443 was reassigned to Judge Brown.

30. On October 7, 1993, petitioner presented another successive Action for Damages for the time period of August 9, 1993, through September 15, 1993, to the Clerk of the Court. The clerk refused to file petitioner's complaint.

31. On January 18, 1994, petitioner filed a "Motion to Vacate the Orders of Div. 3 of the Superior Court of Cochise County dated August 9, 1993, and September 15, 1993". (These were the orders issued by Judge Riley concerning consolidation, jury trial and further access to the courts). This motion was never heard, and Judge Brown later imposed sanctions of $500.00 on petitioner for filing the motion.

32. On February 4, 1994, petitioner filed in U.S. District Court (# CIV 94-93 TUC.ACM) a Tort Action for Damage pursuant to 42 U.S.C. 1983 ET SEQ. against Judge Riley, the Deputy Clerk of the Court, respondents and respondent's lawyers alleging deprivation of constitutional rights under color of state law. (The District Court dismissed; the Court of Appeals affirmed on the grounds of "immunity").

33. By minute entry (without hearing) dated March 7, 1994, Judge Brown set a jury trial date of December 6, 1994, in case # CV 93-08-00443 only.

34. By minute entry (without hearing) dated March 16, 1994, Judge Brown ordered that CV 93-08-00443 be consolidated into CV 92-07-00375.

35. Judge Brown having refused to hear any of the motions pending when the cases were assigned to him, and refusing to hear any of the motions filed after the cases were assigned to him; on October 7, 1994, petitioner filed a Notice of Change of Judge as of right pursuant to rule 42 (f)(1) in case # CV 92-10-00510, and a Notice of Change of Judge for cause pursuant to A.R.S. Sec. 12-409 (& Rule 42 (f)(2)) in case # 92-07-00375.

36. By minute entry (without hearing)

dated November 3, 1994, Judge Brown refused to honor the Notices of Change of Judge (declaring them to be untimely) and imposed sanctions of $3,000.00 on petitioner, payable to the court to be later disposed of by Judge Brown.

37. On November 14, 1994, petitioner filed an "Objection To and Exception To", Judge Brown's ruling dated November 3, 1994, - "and Request for Consideration" and asked for oral argument.

38. By minute entry (without hearing) dated December 2, 1994 (received by the Clerk of the Court and petitioner on Dec. 5, 1994) Judge Brown denied petitioner's Motion for Reconsideration and stating "the Notices of Change of Judge were without merit and are without merit"; and ordering that CV 92-10-00510 be consolidated into CV 92-07-00375.

39. A jury trial before an equitable advisory jury was had on December 6th and 7th, 1994. The jury instructions are in the accompanying appendix.

40. By minute entry of "Findings of Fact and Conclusions of Law" dated Dec. 8, 1994, Judge Brown denied equitable relief to this petitioner based on the doctrine of "Coming to the Nuisance".

41. By minute entry dated December 15, 1994, Judge Brown enjoined petitioner from filing any further suits or litigation against respondents.

42. By minute entry dated February 6, 1995, Judge Brown entered judgement regarding the jury trial; assessing jury fees of $1,268.78 against petitioner.

43. By minute entry dated February 3, 1995, Judge Brown ordered respondents to file a separate affidavit of taxable costs.

44. By minute entry dated April 5,

1995, Judge Brown "ordered that the defendants have judgement against the plaintiff for attorney fees in the amount or $25,107.00 in addition to the judgement for costs entered earlier in the amount of $341.00.

45. Petitioner filed his Notice of Appeal on March 6, 1995, to Div. 2 of the Ariz. Court of Appeals.

46. By memorandum decision filed September 28, 1995, Div 2 affirmed and awarded appeal costs and fees to respondents.

47. On October 5, 1995, petitioner filed a Motion for Reconsideration in Div. 2 of the Ariz. Court of Appeals.

48. On October 20, 1995, Div. 2 denied petitioner's Motion for Reconsideration.

49. On October 31, 1995, petitioner filed a "Petition for Review by Supreme Court of Arizona".

50. The Supreme Court of Arizona, April 23, 1996, denied petitioner's petition for review.

51. The noise is admitted by the respondents; noted by Judge Brown that it could be heard (even with the third muffler attached) in petitioner's bedroom and living room (in the middle of the day) over the noise of 8 jurors, the bailiff, a Deputy Sheriff, respondent's lawyer, and petitioner and wife. Testimony at the trial established that noise is louder at night than it is in the daytime.

52. The public is not privileged to enter either of the properties involved herein. The properties are not situated on a public road. There are no other disturbances (other than respondent's irrigation pump and engine) in this area.

53. Petitioner has not asked that the

farming operation be enjoined but only that the noise from respondent's engine and pump be contained to respondent's own land, and has continuously alleged that this can be done very easily and cheaply.

The requirements of Rule 14 (1)(g)(i) are met in the separate appendix filed herewith.

REASONS FOR GRANTING THE WRIT

This case presents straight-forward questions of law: **(1)** whether A.R.S. Sec. 3-112, when used in a case of private nuisance between strictly private parties, violates constitutional provisions and conflicts with previous decisions of this court. Sec. 3-112 was enacted in 1981 but there are no reported cases in Arizona. It seems that 48 states have "Farm Protection Acts" but there are few reported cases, and what few there are seem to go in different directions. **(2)** Was this petitioner effectively denied a jury trial on the legal issues and afforded only an advisory jury trial in a court of equity in violation of the 7th and 14th Amendments and in conflict with previous decisions of this court? **(3)** Was petitioner denied an honest, fair, and impartial trial before an honest, fair, and impartial tribunal in violation of "due process" and in conflict of previous decisions of this court? **(4)** Did the consolidation of successive actions (over the plaintiff's objections) filed in a case of a continuing abateable nuisance between strictly private parties violate "due process"; infringe upon the right to jury trial to determine liability and

damages; and conflict with previous decisions of this court? **(5)** Have the respondents been given a "noise easement" under color of state law, in violation of the 5th and 14th amendments, and in conflict with previous decisions of this court? **(6)** Would the due process clause of the 14th amendment be violated by Judge Brown's refusal to honor timely-filed notices of Change of Judge, and the imposition of heavy sanctions immediately after the filing of Notices of Change of Judge, without hearing? **(7)** Would the equal protection clause of the 14th amendment be violated by the granting of attorney fees (not as sanctions, but as to the winning party) since the Arizona courts have consistently held that, in actions sounding in tort, attorney's fees are not available? **(8)** And finally, does this petitioner, under the facts of this case, have standing to sue (for himself) for annoyance, inconvenience, and disturbance of the peaceful and quiet use and enjoyment of his home, and the property he has a lawful right to use and enjoy? All of these questions are within the cognizance of this court. Petitioner believes that this court should grant this petition and settle these matters.

ARGUMENT ON FIRST QUESTION PRESENTED

1. In Finlay v. Finlay (Private Nuisance Action, 1993), 18 Kan. App. 2d 479, 856 P.2d 183 (construing a statute virtually identical to A.R.S. 3-112), held that farmers were protected from nuisance suits if the requirements of the act were met, and noted that 47 other states had enacted right to farm

statutes. In Cline v. Franklin Pork, Inc. (Feb. 8, 1985), 219 Neb. 234, 361 N.W. 2d 566, it was held that since there had been no change in the use of the land adjacent to the nuisance, the Farm Protection Act was negated. In Flansburgh v. Coffee (july 5, 1985), 220 Neb. 381, 370 N.W. 2d 127, the court held the same and noted that there had been a change in the use of the defendant's land negating the statute. Petitioner finds no reported cases, concerning A.R.S. 3-112, in Arizona. Since at least 48 states have a Farm Protection Act, and there does not seem to be uniform guidelines established by the states, this court must consider the limits of these acts.

2. Petitioner's actions alleged a private nuisance of a continuing, abatable, temporary character between strictly private parties. Sec 3-112 makes no distinction between public and private nuisance. See Smith v. Cahoon (1931), 283 U.S. 553, 75 L. Ed. 1264, 51 S. Ct. 582. Therefore, Sec. 3-112 is unconstitutionally vague. See Cramp v. Bd. of Pub. Instruction (1961), 368 U.S. 278, 7 L. Ed. 2d 285, 82 S. Ct. 275. and Sec. 3-112 must be strictly construed. See Varjabedian v. City of Madera (1977), 142, Cal. Rptr. 429, 572 P.2d 43.

3. Nuisance is defined in A.R.S. Sec. 13-2917(a) and the conditions for its being a public nuisance is there defined. The conditions for its being a private nuisance is spelled out in City of Phoenix v. Johnson (1938), 51 Ariz. 115, 75 P. 2d 30; and Spur Industries, Inc. v. Del E. Webb Development Co. (1972), 108 Ariz. 178, 494 P. 2d 700.

4. It has long been settled, by this

court, that a private nuisance cannot be immunized from a private suit for damages. See Baltimore & Potomac R.R. Co. v. Fifth Baptist Church (1883), 108 U.S. 317, 2 S. Ct. 719, 27 L. Ed. 739; and Richards v. Washington Terminal Co. (1914), 233 U.S. 546, 58 L. Ed. 1088, 34 S. Ct. 654. See also Northwestern Fertilizer Co. v. Hyde Park (1878), 97 U.S. (7 Otto.) 659, 24 L. Ed. 1036.

5. It is settled that private property cannot be taken by the state for another's private use. See Thompson v. Consolidated Utilities Corp. (1937), 300 U.S. 55, 81 L. Ed. 510, 57 S. Ct. 364, and Hawaii Housing Authority v. Midkiff (1984), 467 U.S. 229, 81 L. Ed. 2d 186, 104 S. Ct. 2321.

6. The right to the peaceful and quiet use and enjoyment of property is, itself, property (see in Re Forstrom (1934), 44 Ariz. 472, 38 P. 2d 878; Hoffman v. Kinealy (Mo. S. Ct. 1965), 389 S.W. 2d 745) and is protected by our constitutions (See Shelley v. Kraemer (1948), 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161; U.S. v. General Motors Corp. (1945), 323 U.S. 373, 89 L. Ed. 311, 65 S. Ct. 357; Pruneyard Shopping Center v. Robins (1980), 447 U.S. 74, 64 L. Ed. 2d 741, 100 S. Ct. 2035), just as the "Right to Exclude Others" was protected by this court in Kaiser Aetna v. U.S. (1979) 444 U.S. 164, 62 L. Ed. 2d 332, 100 S. Ct. 383; Nollan v. Cal. Coastal Com'n. (1987), 483 U.S. 825, 97 L. Ed. 2d 677, 107 S. Ct. 314; and Dolan v. City of Tigard (1994), #93-518, 114 S. Ct. 2309. Does the right to exclude others include the right to exclude the annoying noise of others?

7. Div. 2 of the Arizona Court of Appeals held that Sec. 3-112 merely

created a "rebuttable presumption". This might be true in the case of a public nuisance (which can have an "adverse effect on the public's health and safety"), but it cannot be applied to a private nuisance which cannot (by the very definition of private nuisance have an "adverse effect on the public health and safety"), else it would not be a private nuisance; it would be a public one. Sec. 3-112 creates an arbitrary presumption, in a case of private nuisance, that cannot be rebutted. See Western and A. R. R. v. Henderson (1929), 279 U.S. 639, 73 L. Ed. 884, 49 S. Ct. 445.

8. Since the state has not paid "just compensation" for the property it has taken and given to the farmers; and since Sec. 3-112 does not authorize compensation; Sec. 3-112 is in violation of the 5th and 14th amendments to the Federal Constitution, and Art. 2 Sec. 4 & 17 of the State Constitution. See Hughes v. Washington (1967), 389 U.S. 290, 88 S. Ct. 438, 19 L. Ed. 2d 530. Even temporary takings must be compensated. See First English Evan. Luth. Church v. L.A. County (1987), 482 U.S. 304, 96 L. Ed. 2d 250, 107 S. Ct 2378.

9. Also, Sec. 3-112 is a "special" law and unconstitutional under the 14th amendment; Art. 2, Secs. 9 & 13, and Art. 4, Part 2, Sec. 19, Subsection 13 of the Arizona Constitution. It protects only farmers at the expense of individuals who are not farmers and who live adjacent to farmers. See Arizona Downs v. Arizona Horseman's Foundation (1981), 130 Ariz. 550, 637 P. 2d 1053, and State v. Loughran (1985), 143 Ariz. 345, 693 P. 2d 1001.

ARGUMENT ON 2ND QUESTION PRESENTED

1. On August 9, 1993, Judge Riley consolidated all of petitioner's Tort Actions (that he had jurisdiction of) into petitioner's Action in Equity; ruled that petitioner could not have a jury trial to determine liability and damages, but only an equitable advisory jury which the court could ignore; ordered the Clerk of the Court not to file any more of the petitioner's successive actions unless pre-approved by the court; thereby laying down the "law of the case". Petitioner had requested a jury trial in each of his Tort Actions for damages; he had not requested a jury trial in his action of equity (neither had the defendants). See pages 21 and 37 of the reporter's transcript of August 9, 1993.

2. As for the right and necessity of filing successive actions in the case of a continuing, abatable nuisance, see Baltimore & Potomac R. Co. v. Fifth Baptist Church (1891), 137 U.S. 568, 11 S. Ct. 185, 34 L. Ed. 784; Reynolds Metal Co. v. Wand (9 Cir. 1962), 308 F. 2d 504; City of Phoenix v. Johnson (1938), 51 Ariz. 115, 75 P. 2d 30, City of Tucson v. Apache Motors (1952), 74 Ariz. 98, 245 P. 2d 255.

3. The State of Arizona has mandated that in a continuing, abatable nuisance, successive actions for successive injuries must be brought (City of Tucson v. Apache Motors, Supra.); therefore, under the due process clause of the 14th Amendment (and Art. 2, Sec. 4, and Art. 4 Part 2, Sec. 19, Subsec. 6, of the Az. Const.) Superior Court judges may not deny that right. See Boddie v.

Connecticut (1971), 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113. The Right of Access to the courts is also guaranteed by the First Amendment to the U.S. Constitution (& Art. 2, Sec. 5, and Art. 18, Sec. 6 of the Az. Const.). See Ca. Transport v. Trucking Unlimited (1972), 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642; Franks v. U.S. Fidelity & Guar. Co. (1985), 149 Ariz. 291, 718 P. 2d 193.

4. It is well-settled that a jury trial on the legal issues cannot be denied because equity has entered the case, or by the court's consideration of only the equitable issues. See Beacon Theatres, Inc. v. Westover (1959), 359 U.S. 500, 3 L. Ed. 2d 988, 79 S. Ct. 948; Dairy Queen, Inc. v. Wood (1962), 369 U.S. 469, 8 L. Ed. 2d 44, 82 S. Ct. 894, Ross v. Bernhard (1970), 396 U.S. 531, 90 S. Ct. 733, 24 L. Ed. 2d 729; Paris-Phoenix Corp. v. Esper (1975), 112 Ariz. 320, 541 P. 2d 917. The Due Process Clause of the 14th Amendment would require the same procedure in the State Courts. The Ariz. Const. (Art. 2, Sec. 23, & Art. 6, Sec. 17) guarantees the right to jury trial. Also, when Arizona adopted the U. S. Constitution (Art. 2, Sec. 3 of the Az. Const), it adopted the entire constitution (including the 7th amendment) and the Federal Case Law concerning the Federal Constitution.

5. On December 7, 1994, Judge Brown instructed the jury that they could not consider the question of liability and damages. See reporter's transcript of Dec. 7, 1994, at page 39. Also, it is clear, from the instructions given, that the jury was "advisory" only, for equitable purposes.

ARGUMENT ON 3RD QUESTION PRESENTED

1. A private nuisance is tied to an interest in the use and enjoyment of property. See State of N.Y. v. Shore Realty Corp. (2nd Cir. 1985), 759 F. 2d 1032, and may constitute a taking of property. See Baltimore & Potomac R.R. Co. v. Fifth Baptist Church (1883), 108 U.S. 317, 2 S. Ct. 719, 27 L. Ed. 739; Richards v. Washington Terminal Co. (1914), 233 U.S. 546, 58 L. Ed. 1088, 34 S.Ct. 654; Thornburg v. Port of Portland (1962), 233 Or. 178, 376 P. 2d 100; Martin v. Port of Seattle (1964), 64 Wash. 2d 309, 391 P. 2d 540; City of Jacksonville v. Schumann (Fla. 1967), 199 S. 2d 727 (Cert. Den. 390 U.S. 981, 88 S. Ct. 1101, 19 L. Ed. 2d 1278); Johnson v. City of Greenville (1968), 222 Tenn. 260, 435 S. W. 2d 476; Aaron v. City of L.A. (1974), 40 C.A. 3rd 471, 115 Cal. Rptr. 162; Ky. & W. Va. power Co. v. Anderson (1941), 288 Ky. 501, 156 S.W. 2d 857.

2. When Judge Riley ordered the Clerk of the Court not to file anymore of petitioner's complaints; and Judge Brown issued his injunction ordering petitioner not to file any more complaints until impossible conditions were met, while, at the same time, permitting the respondents to continue to maintain their noise unabated, the State of Arizona, acting through it's judges, took a noise (or air) easement from this petitioner and gave it to the respondents, in violation of the 5th and 14th Amendments, and Art. 2, Secs. 4 & 17, and Art. 4, Part 2, Sec. 19, Subsec. 6, of the Arizona Constitution.

ARGUMENT ON 4TH QUESTION PRESENTED

1. On October 7, 1994, petitioner timely filed a Notice of Change of Judge as of right against Judge Brown pursuant to Rule 42(f)(1) of the Az. R. Civ. P. in Case #CV 92-10-00510; and an Affidavit of Change of Judge for cause pursuant to A.R.S. Sec. 12-409 (& see rule 42 (f)(2) ARCP) in Case #CV 92-07-00375. Although no reason is required to be given for timely filed Notices of Change of Judge, petitioner stated his reason; that Judge Brown had refused, for a period of one year,to hear motions pending when the cases were assigned to him, and had refused to hear motions filed after the cases were assigned to him. But see Art. 6, Sec. 21 of the Ariz. Const. and Rule 13 of the Uniform Rules of Practice for the Superior Courts of Arizona.

2. Under the provisions of A.R.S. Sec. 12-410, Judge Brown could not cite petitioner for contempt for filing the Motions of Change of Judge, so, by minute entry (no hearing) dated November 3, 1994, Judge Brown imposed sanctions of $3,000.00 (payable to the court to be later disposed of by Judge Brown) on petitioner. The Appeals Court held that petitioner had "waived" his right to a change of judge by going to trial. But, heavy sanctions had already been imposed; heavy sanctions were sure to follow a refusal to go to trial, and even "jail" for contempt of court. There was no voluntary "waiver". See Garrity v. N.J. (1967), 385 U.S. 493, 17 L. Ed. 2d 562, 87 S. Ct. 616.

3. On November 14, 1994, petitioner filed an "Objection to and exception to", Judge Brown's ruling dated Nov. 3, 1994 - and requesting oral argument. By minute entry (without hearing) dated 12/2/94, Judge Brown denied petitioner's motion.

On Change of Judge, see:

1. Ross v. White (1935), 46 Ariz. 304, 50 P. 2d 12;
2. Mosher v. Wayland (1945), 62 Ariz. 498, 158 P. 2d 654;
3. Marsin v. Udall (1955), 78 Ariz. 309, 279 P. 2d 721;
4. Smith v. Rabb (1963), 95 Ariz. 49, 386 P. 2d 649;
5. State v. Carpenter (1965), 1 Ariz. App. 522, 405 P. 2d 460;
6. Edwards v. Superior Court (1967), 5 Ariz. App. 211, 424 P. 2d 859;
7. Truck Equip. Co. of Az. v. Vanlandingham (1968), 103 Ariz. 402, 4 442 P. 2d 849;
8. West v. Superior Court (1868), 104 Ariz. 1, 448 P. 2d 57;
9. Itasca State Bank v. Superior Court (1968), 8 Ariz. App. 279, 445 P. 2d 555;
10. State v. Garcia (1977), 114 Ariz. 317, 560 P. 2d 1224;
11. City of Sierra Vista v. Cochise Enterprises (1979), 128 Ariz. 467, 626 P. 2d 1099;
12. Tash v. Saunders (1987), 153 Ariz. 322,736 P. 2d 805;
13. Flagel v. S.W. Clinical Physiatrist (1988), 157 Ariz. 196, 755 P. 2d 1184;
14. Lewis v. Kelliher (1992), 171 Ariz. 228, 829 P. 2d 1274:
15. Zuniga v. Superior Court (1954), 77 Ariz. 222, 269 P. 2d 720;
16. Murray v. Thomas (1956), 80 Ariz. 378, 298 P. 2d 795;
17. Hendrickson v. Superior Court (1958), 85 Ariz. 10, 330 P. 2d 507;
18. State v. Neil (1967), 102 Ariz. 110, 425 P. 2d 842;
19. Del Castillo v. Wells (1974), 22 Ariz. App. 41, 523 P. 2d 92;

20. Huck v. Haralambie (1979), 122 Ariz. 63, 593 P. 2d 286;
21. Liston v. Butler (1966), 4 Ariz. App. 460, 421 P. 2d 542;
22. State v. Harwood (1974), 110 Ariz. 375, 519 P. 2d 177;
23. Itule v. Farley (1963), 94 Ariz. 242, 383 P. 2d 127;
24. Chalpin v. Mobile Gardens, Inc. (1972), 18 Ariz. App. 231, 501 P. 2d 407;
25. Hickox v. Superior Court (1973), 19 Ariz. App. 195, 505 P. 2d 1086;
26. Caruso v. Superior Court (1966), 100 Ariz. 167, 412 P. 2d 463;
27. Zoellner v. Zoellner (1967), 4 Ariz. App. 561, 442 P. 2d 392;
28. Spriggel v. County of Maricopa (1971), 15 Ariz. App. 162, 487 P. 2d 8;
29. Apache East, Inc. v. Means (1979), 124 Ariz. 11, 601 P. 2d 615;
30. Focal Point, Inc. v. Court of Appeals (1986), 149 Ariz. 128, 717 P.qd 432;
31. Rourk v. State (1991), 170 Ariz. 6, 821 P. 2d 273;
32. City of Tucson v. Wondergem (1966), 4 Ariz. App. 291, 419 P. 2d 552;
33. Lamb v. Superior Court (1980), 127 Ariz. 400, 621 P. 2d 906;
34. Hordyk v. Farley (1963), 94 Ariz. 189, 382 P. 2d 668;
35. Berger v. U.S. (1921), 255 U.S. 22, 65 L. Ed. 481, 41 S. Ct. 437;
36. Tumey v. Ohio, (1927), 273 U.S. 510, 71 L. Ed. 749, 47 S. Ct. 437;
37. In Re Murchinson (1955), 349 U.S. 133, 99 L. Ed. 942, 75 S. Ct. 623;
38. Ward v. Village of Monroeville (1972), 409 U.S. 57, 34 L. Ed. 2d 267, 93 S. Ct. 80;
39. Aetna Life Ins. Co. v. Lavoie (1986), 475 U.S. 813, 89 L. Ed. 2d 823,

106 S. Ct. 1580:

40. Liljeberg v. Health Services Acquisition Corp. (1988), 486 U. S. 847, 100 L. Ed. 2d 855, 108 S. Ct. 2194.

4. In Ward v. Village of Monroeville, Ohio, Supra, the money was to be paid into the city's finances. This court reversed and remanded. Here, the sanctions ($3,000.00) were to be paid to the Clerk of the Court for later disposition by Judge Brown.

5. Concerning these sanctions (remember that Judge Brown refused to hear anything from Aug. 1, 1993, until the date of trial (Dec. 6, 1994); and the Appeals Court simply ignored the issue of sanctions and attorney fees), see **(1)** Holt v. Va. (1965), 381 U.S. 131, 85 S. Ct. 1375, 14 L. Ed. 2d 290; **(2)** Groppi v. Leslie (1972), 404 U.S. 496, 92 S. Ct. 582, 30 L. Ed. 2d 632; **(3)** Goldberg v. Kelly (1970), 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287; **(4)** Brinkerhoff-Faris Trust & Savings Co. v. Hill (1930), 281 U.S. 673, 50 S. Ct. 451, 74 L. Ed. 1107.

6. Punishment is punishment, no matter what form (sanctions or contempt of court) it takes. Punishment without hearing violates due process of law. When petitioner timely filed his Notices of Change of Judge on October 7, 1994, Judge Brown lost all jurisdiction to proceed further. Jurisdiction was gone. Therefore, all acts of Judge Brown, after October 7, 1994, are complete nullities.

7. The Court of Appeals stated that the Notice of Change of Judge for cause was based on events that occurred on March 7, 1994, and was untimely filed on October 7, 1994, under the Provisions of Rule 42(f)(2), Az. R. Civ. P. The only event

occurring on March 7, 1994, was Judge Brown's setting a jury trial date in Case # CV 93-08-00443.

8. Evidently, the Appeals Court did not even read petitioner's affidavit of Change for Cause. Also, it is settled law that a Rule of Procedure cannot be used to negate the statute (A.R.S. Sec. 12-409). See Hordyk v. Farley, Supra, and Marsin v. Udall, Supra. If a Rule of Procedure is used so as to deny a party a fair and impartial trial before a fair and impartial judge, it would violate the due process provisions of the 14th Amendment.

9. As the cases cited above show, the right to a change of judge is "waived" only when it is filed <u>after</u> the judge has heard evidence to be used at the trial. Here, at the time of filing the Notices of Change of Judge, Judge Brown had heard nothing. His refusal to hear anything was the main reason stated for filing the Notices of Change of Judge.

10. The Appeal Court held that petitioner had "waived" his Change of Judge as of right by going to trial. It is settled "consent" does not confer jurisdiction on a court. See City of Tucson v. Wondergem, Supra, and Lamb v. Superior Court, Supra. When the Notices of Change of Judge were timely filed, jurisdiction was gone; petitioner could not restore it.

11. The Appeals Court conveniently overlooked Rule 42(f)(2)(d): "Hearing and Assignment. The presiding judge shall forthwith provide for a hearing to determine the issues connected with the affidavit". The presiding judge of Cochise County is Matthew Boroweic. It would seem clear that the Due Process clause of the 14th Amendment has been

thrown in the trashcan.

ARGUMENT OF 5TH QUESTION PRESENTED

1. The law, in Arizona, does not allow the granting of attorney fees in actions sounding in tort, yet, Judge Brown awarded attorney fees of over $25,000.00 to the respondents, and the Court of Appeals simply ignored the issue. But see: **(1)** Sparks v. Republic National Life Ins. Co. (1982), 132 Ariz. 529, 647 P. 2d 1127; **(2)** Hoffman v. Greenberg (1988), 159 Az. 377, 767 P. 2d 735; **(3)** Fire Ins. Exchange v. Thunderbird Masonry (1993), 177 Ariz. 365, 868 P. 2d 948; **(4)** Smith v. American Exp. Travel Services (1994), 179 Ariz. 131, 876 P. 2d 1166; **(5)** Hughes v. Rowe (1980), 449 U.S. 5, 101 S. Ct. 173, 66 L. Ed. 2d 163; **(6)** City of Cleburne Tex. v. Cleburne Living Center (1985), 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313; **(7)** Spevack v. Klein (1967), 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574.

2. Petitioner requested a "reported" decision. The Appeals Court issued an unpublished memorandum decision which could not be used as a precedent in other cases. Petitioner understands why. It would seem clear that the Equal Protection clause of the 14th Amendment has been utterly trashed.

JURY INSTRUCTIONS

1. The objectionable jury instructions are reproduced in the separate Appendix filed herewith. These instructions make it clear that, not only was the jury an equitable "advisory" jury, but also that Judge Brown was so biased and prejudiced

that he made sure there would be a general verdict adverse to petitioner.

2. In jury instructions 11 & 12, Judge Brown converted petitioner's "nuisance" actions into "negligence" actions. But see: **(1)** Philadelphia Elec. Co. v. Hercules, Inc. (3 Cir. 1985), 762 F. 2d 303; **(2)** MacDonald v. Perry (1927), 32 Ariz. 39, 255 P. 494; **(3)** Lunt v. Brady Manufacturing Corp. (1970), 13 Ariz. 305, 475 P. 2d 964; **(4)** City of Phoenix v. Johnson (1938), 51 Ariz. 115, 75 P. 2d 30; **(5)** Vincent v. Salt Lake County (Ut. 1978), 583 P. 2d 105; **(6)** E. Rauh & Sons Fertilizer Co. v. Sheffler, 139 F. 2d 38; **(7)** Bohan v. Port Jervis Gas-Light Co., 122 N.Y. 18, 25 N. E. 246; **(8)** Wood v. Picillo (R.I. 1982), 443 A. 2d 1244; **(9)** Restatement of Torts (2d), Sec. 822, Comment on Clause (b), 2nd Par of Subsec. J., page 114; **(10)** Mower v. Ashland Oil & Refining Co. (7th Cir. 1975), 518 F. 2d 659.

3. Jury instruction #13 amounted to a directed verdict for respondents. It instructed the jury that, if petitioner could stand the complained of noise, he must stand it; and intimated to the jury that the court believed that the complained-of-noise was a mere trifle and petty annoyance and disturbance which the law did not concern itself with.

4. Jury instruction #14 is the so-called "Balancing of Equities", with the comparative injury part deliberately omitted. This doctrine is used (in actions between private parties) only when the action is for an injunction pendant lite. Otherwise, it is only used in an action for an injunction where the defendant is imbued with an

interests of the public and the overriding public interest, where the interests of the individual must be considered. It cannot ever be used in actions for damages. To hold that this doctrine could be used in actions between strictly private parties would be to hold that this equitable doctrine negates the Takings Clauses of the 5th and 14th Amendments, and Art. 2, Sec. 17 of the Arizona Constitution. But see: **1.** Restatement of Torts (2d) Sec. 930, last par. of "Comment on Subsection (2)", page 550; **2.** 40 ALR 3rd 601 (annotation - Modern status of rules as of balance of conveniences or social utility as affecting relief from nuisance), at 610, 1st Col., 2nd par.; **3.** Susquehanna Fertilizer Co. v. Malone (1890), 73 Md. 268, 20 A. 900; **4.** Evans v. Reading Chemical & Fertilizing Co. (1894), 160 Pa. 209, 28 A. 702; **5.** New York v. Pine (1902), 185 U.S. 93, 22 S. Ct. 592, 46 L. Ed. 820; **6.** U.S. v. Luce (Cir. Ct. D. Del. 1905), 141 Fed. Rptr. 385; **7.** Booth-Kelly Lumber Co. v. City of Eugene (1913), 67 Or. 381, 136 P. 29; **8.** Mobile & O.R. Co. v. Zimmern (1921), 206 Ala. 37, 89 S. 475, 16 ALR 1352; **9.** City of Phoenix v. Johnson (1938), 51 Ariz. 115, 75 P. 2d 30; **10.** Wright v. Best (1942), 19 Cal. 2d 368, 121 P. 2d 702; **11.** Sam Warren & Son Stone Co. v. Gruesser (1948), 307 Ky. 98, 209 S.W. 2d 817; **12.** Sexton v. Pub. Ser. Coordinated Transport (1949), 5 N.J. Super. 555, 68 A. 2d 648; **13.** Port of N.Y. Authority v. City of Newark (1952), 17 N.J. Super. 328, 85 A. 2d 815; **14.** York v. Stallings (Or. S. Ct., 1959), 341 P. 2d 529; **15.** Anderson v. Souza (1952), 38 Cal. 2d 825, 243 P. 2d 497;

16. Ariz. Hercules C. Co. v. Protestant E. Church Corp. (1920), 21 Ariz. 470, 190 P. 85; **17.** Loma Portal Civic Club v. American Airlines, Inc. (1964), 61 Cal. 2d 582, 394 P. 2d 548; **18.** Stuart v. Lake W Washington Realty Corp. (1956), 141 W. Va. 627, 92 S. E. 2d 891; **19.** Guarina v. Bogart (1962), 407 Pa. 307, 180 A. 2d 557; **20.** Thornburg v. Port of Portland (1966), 244 Or. 69, 415 P. 2d 750; **21.** Gerrish v. Wishbone Farm of N.H., Inc. (1967), 108 N.H. 237, 231 A. 2d 622; **22.** Jost v. Dairyland Power Coop. (1970), 45 Wis. 2d 164, 172 N.W. 2d 647; **23.** Wagner v. Burlington Industries, Inc. (1969), 47 F.R.D. 146; **24.** Cheyenne Airport Bd. v. Rogers (1985), (Wyo. S. Ct.), 707 P. 2d 717; **25.** Restatement of Torts (2d), Ch. 40, Sec. 822, Page 110, Comment "D".

There seems to be much confusion, in the courts, concerning the application of this equitable doctrine. Will this court consider this issue and clear up this confusion?

PRIORITY OF USE

1. As part of instruction #14, the jury was instructed to consider the "Coming to the Nuisance" doctrine. Also, this was the reason given for denial of the requested injunction. But this doctrine has a very limited application. It could be used in a case of a "permanent" private nuisance (only one cause of action and statute of limitations begin to run at creation of nuisance) where a prescriptive right had been obtained, or, where a previous owner had already collected damages. It cannot be applied

(even in a case of a permanent private nuisance) where no prescriptive right had been obtained, and where no previous owner had collected damages. To do so would violate the "takings" clauses of the 5th and 14th Amendments.

2. This doctrine can never be applied in a case of a "continuing", abatable private nuisance (where the statute of limitations are tolled and "every continuance of the nuisance is a new nuisance for which a fresh action will lie" (Baltimore & Potomac R. Co. v. Fifth Bap. Ch. (1891), 137 U.S. 568, 11 S. Ct. 185, 34 L. Ed. 784, Supra.), for the reason that the nuisance occurring today is not the same nuisance that occurred yesterday. The same is true whether the action if for an injunction or damages, or both. To apply this doctrine in such cases would be to hold that this doctrine negated the "takings" clauses of the 5th & 14th Amendments and Art. 2. Sec. 17 of the Arizona Constitution. See:

1. W. Prosser & W. Keeton, The Law of Torts, (5th Ed.), Sec 88b, Pg. 635, 2nd col., 2nd par.; 2. Northwestern Fertilizing Co. v. Hyde Park (1878), 97 U.S. (7 Otto) 659, 24 L. Ed. 1036; 3. U.S. v. Luce (C.C. 1905), 141 Fed. Rptr. 385; 4. Clarke v. Borsen (10 Cir. 1930), 39 F. 2d 800; 5. Patrick v. Sharon Steel Corp. (1982), 549 F. Supp. 1259; 6. Fisher v. Atl. Richfield Co. (1989), 774 F. Supp. 616; 7. Allison v. Smith (Colo. 1984), 695 P. 2d 791; 8. Campbell v. Seaman (1876), 63 N.Y. 568, 20 Am. Rep. 567; 9. Shearing v. City of Rochester (1966), 51 Misc. 2d 436, 173 N.Y.S. 2d 464; 10. Zamzok v. 650 Park Ave. Corp. (1974), 80 Misc. 2d

573, 363 N.Y.S. 2d 868; **11.** Fordham Operating Corp. v. Westchester County (1975), 82 Misc. 2d 566, 370 N.Y.S. 2d 977; **12.** Ensign v. Walls (1948), 323 Mich. 49, 34 N.W. 2d 549; **13.** Curry v. Livestock Market (Ky. 1961), 343 S.W. 2d 134; **14.** Crushed Stone Co. v. Moore (1962), (Okla.), 369 P. 2d 811; **15.** Assoc. Metals & Min. Corp. v. Dixon Chem. & Res. (1962), 82 N.J. Super. 281, 197 A. 2d 569; **16.** Van Fossen v. Clark (1901), 113 Iowa 86, 84 N.W. 989; **17.** Kissel v. Lewis (1901), 156 Ind. 233, 59 N.E. 478; **18.** Richards v. Ohio River R. Co. (1904), 56 W. Vw. 592, 49 S.E. 385; **19.** Oehler v. Levy (1908), 234 Ill. 595, 85 N.E. 271; **20.** Mileur v. McBride (1986), 101 Ill. Dec. 257, 498 N.E. 2d 581; **21.** Seifert v. Dillon (1909), 83 Neb. 322, 119 N.W. 686; **22.** Susquehanna Fertilizer Co. v. Malone (1980), 73 Md. 276, 20 A. 900; **23.** Fish & Game Ass´n. v. Carlucci (1990), 83 Md. App. 121, 573 A. 2d 847; **24.** Carter v. Lake City Baseball Club (1950), 218 S.C. 255, 62 S.E. 2d 470; **25.** Vowinckel v. N. Clark & Sons (1932), 216 Cal. 156, 13 P. 2d 733; **26.** White v. Suncook **Mills (1940, N.H.), 13 A. 2d 729; 27.** Klassen v. Cent. Kan. Coop. Cream Ass´n. (1946), 160 Kan. 697, 165 P. 2d 601; **28.** Robinson v. Westman (1947), 224 Minn. 105, 29 N.W. 2d 1, 174 ALR 746; **29.** Kellogg v. Village of Viola (1975), 67 Wis. 2d 345, 227 N.W. 2d 55; **30.** Cain v. Roggero (1944), 28 Del. Ch. 131, 38 A. 2d 735; **31.** Guarina v. Bogart (1962), 407 Pa. 307, 180 A. 2d 557; **32.** Ellis v. Blanchard (1950, LA.), 45 S. 2d 100; 33. Mahone v. Autry (1951), 55 N.M.

111, 227 P. 2d 623; **34.** Forbes v. City of Durant (1950), 209 Miss. 246, 46 S. 2d 551; **35.** Lawrence v. Eastern Airlines (1955), (Fla.), 81 S. 2d 632; **36.** Roughton v. Thiele Kaolin Co. (1953), 209 Ga. 577, 74 S.E. 2d 844; **37.** Spur Industries, Inc. v. Del E. Webb Development Co. (1972), 108 Ariz. 178, 494 P. 2d 700; **38.** Spain v. City of Cape Girardeau (Mo. 1972), 484 S.W. 2d 498.

3. Petitioner and wife acquired their property on Oct. 23, 1972. Respondents acquiring their property on Dec. 29, 1976. In order to apply this doctrine, Judge Brown had to find that the farm, itself, was a permanent nuisance since 1954, and that the Teco engine (installed in 1992) was exactly the same as the Caterpillar engine (installed in 1974). Petitioner has not alleged that the farm was a nuisance; only that the manner in which these engines were operated permitted these engines to emit noise sufficient to be a nuisance. It would seem clear that Judge Brown was very biased and prejudiced, to the point that the due process clause of the 14th Amendment was violated.

Jury instruction #15 (A.R.S. Sec. 3-112) has already been argued above as Question #1.

LAST CONTROVERSY

1. In the reporter's transcript of Dec. 7, 1994, at page 60, lines 12 thru 17: "**Mr. Willbanks:** Okay. I'll make a motion for mistrial one more time for the record. **The Court:** Thank you, Mr. Willbanks. The record will show that the motion is denied. The record may also show that you do not have

standing to make the motion."
2. Petitioner submitted the question of "standing" to the Appeals Court. The Appeals Court, at page 10, next to last par. of their decision, stated: "Consequently, we do not reach this issue."
3. It seems clear that petitioner does have standing to sue for personal injuries to himself. See: **1.** Ford v. Revlon (1987), 153 Ariz. 38, 734 P. 2d 580; **2.** Armory Park v. Episcopla Community Services (1985), 148 Ariz. 1, 712 P. 2d 914; **3.** 66 C.J.S., Nuisances, Sec 82, P. 838; **4.** 66 C.J.S., Nuisances, Sec. 19, P. 770; **5.** 66 C.J.S., Nuisances, Sec. 13, P. 758; **6.** 66 C.J.S., Nuisances, Sec. 18, P. 765; **7.** 66 C.J.S., Nuisances, Sec. 19, P. 767; **8.** 66 C.J.S., Nuisances, Sec. 8, P. 739; **10.** A.R.S. Sec. 13-2917 (a); **11.** Vann v. Bowie Sewerage Co. (Tex.), 90 S.W. 2d 561; **12.** George v. City of Houston (Tex.), 465 S.W. 2d 387; **13.** Sun Ray Oil Corp. v. Sharpe (1954), 209 F. 2d 937; **14.** Ky. W. Va. Gas Co. v. Lafferty, 174 F. 2d 848; **15.** Gesswin v. Beckwith (Conn. 1978), 397 A. 2d 121; **16.** MacDonald v. Perry (1927), 32 Ariz. 39, 255 P. 494; **17.** U.S. Smelting Co. v. Sisam (8 Cir., 1911) 191 Fed. Rptr. 293; **18.** Klassen v. Central Kan. Coop. Creamery Ass'n, 160 Kan. 697, 165 P. 2d 601.

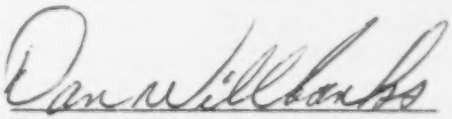
CONCLUSION

1. It would seem clear that by enacting A.R.S. Sec. 3-112, the Arizona Legislature declared "farms" to be a nuisance per se (as did the Court of Appeals at Par. b, pg. 7 of their opinion). It would seem that the harm caused by farming operations, in Arizona, is

caused "under color of state law". As it now stands, the result of this proceeding is: (1) Petitioner is approximately $30,000.00 in debt; (2) petitioner still must endure the same noise that keeps him awake at night; (3) petitioner is denied the right to complain (in court) about this 24-hour-a-day noise. It would seem clear that petitioner has been sentenced to endure this noise for the rest of his life.

2. For all the foregoing reasons, petitioner believes this petition for a Writ of Certiorari should be granted.

Respectfully Submitted



Dan Willbanks, pro se
5158 W. Buford Lane
McNeal, AZ 85617
(520)642-3746